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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1676

ALAN J. WHITE,

Petitioner,

v.

ARLEN REALTY & DEVELOPMENT CORP.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

ARLEN REALTY & DEVELOPMENT CORP.'S BRIEF IN OPPOSITION

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ARLEN REALTY & DEVELOPMENT CORP.'S BRIEF IN OPPOSITION

Petitioner Alan J. White ("White"), a practicing attorney, seeks review of a decision by the court of appeals which denied him an attorney's fee for his *pro se* activities at and prior to the trial of this action brought under the Truth in Lending Act, 15 U.S.C. section 1601 *et seq.* ("TILA"), in which White recovered a $100 statutory penalty and an attorney's fee of $4,000 for counsel retained by White to represent him in post-trial proceedings.

Opinion Below

The opinion of the court of appeals is officially reported at 614 F.2d 387.

Statutes Involved

The Truth in Lending Act, 15 U.S.C. section 1640(a) (1976), and 28 U.S.C. section 2106 (1976) are set forth as an addendum hereto.

Questions Presented

1. Should this Court reverse the explicit statement by the court of appeals (2a) that appellee Arlen Realty & Development Corp. contests White's entitlement to an award of an attorney's fee because White, who expressly asked the court of appeals to examine the propriety of the district court's award of an attorney's fee for his *pro se* representation in this action, would limit the court of appeals' jurisdiction to an upward modification of the award?

2. Is White, himself an attorney, entitled to an attorney's fee under 15 U.S.C. section 1640(a)(3) for his *pro se* efforts in this TILA action when an attorney's fee has already been awarded to White's retained counsel herein?

Statement of the Case

A statement of the case is included in this brief to clarify the statement contained in White's petition.

White brought this action to recover statutory penalties under the TILA. He claimed that defendant-respondent

Arlen Realty & Development Corp. ("Arlen"), then the owner and operator of Korvettes Department Stores ("Korvettes"), violated section 127(b)(2) of TILA, ch. 41, sec. 127, 82 Stat. 153 (1968) (current version at 15 U.S.C. sec. 1637 (1976)) by failing to provide White, a Korvettes charge account customer and holder of a Korvettes credit card, with a "brief identification . . . of the goods and services" he purchased in 1971 and 1972 (Appendix to the briefs filed in the court of appeals [hereinafter referred to as "A"], at 2-9). White did not claim or prove that he sustained any actual damage as a result of the wrongs alleged.

The district court, after trial, denied relief, holding that White lacked standing to sue and that the identification provided by Korvettes was sufficient to satisfy the requirements of the TILA. 374 F.Supp. 151 (D. Md. 1974). The court of appeals, however, reversed, ruling that (i) neither the failure of Korvettes' purchase and billing procedure to deceive White nor the absence of any service charges denied White standing to sue, 540 F.2d 645, 650 (1976), and (ii) the designations describing the goods purchased by White and contained on the charge slip and cash register tape associated with each sale did not constitute the "brief identification . . . of the goods and services purchased" required by section 127(b)(2), 540 F.2d at 650-51. The case was remanded with instructions that judgment be entered for White in the sum of $100, the minimum statutory recovery, and costs and reasonable attorney's fees as determined by the district court. 540 F.2d at 651, 652.

The role of White *pro se*.

White represented himself in pre-trial proceedings and at the trial of this action. Although he is a full-time attorney employed by the Office of Special Assistants to

the Federal Power Commission, White has represented himself in at least four other TILA actions, both prior and subsequent to the filing of this action (12a, 20a). See, *e.g., White* v. *Central Charge Service, Inc.,* [1969-1973 Transfer Binder] Cons. Cred. Guide (CCH) ¶99,170 (D.C. Sup. Ct. 1972); *White* v. *Lynn Jewelers, Ltd.,* Cons. Cred. Guide (CCH) ¶98,601 (D.D.C. 1975). Four of White's TILA actions, including this one, were commenced in May, 1972, and White admits that "I had overextended myself with respect to my capacity to manage them simultaneously" (4a, fn. 2).

Rather than furthering the intent and purpose of the TILA by participating in its enforcement as a *bona fide* "private attorney general," White has been in the business of prosecuting, *pro se,* actions under the TILA for the sole apparent purpose of generating attorney's fees. This purpose is manifest from White's conduct in *White* v. *Lynn Jewelers, Ltd., supra,* which White prosecuted on his own behalf. Thus, White admits that he settled the attorney's fee aspect of the *Lynn Jewelers* case for a nominal fee of $100 solely in order to create a precedent for a much higher award in this action.* As stated by White:

> "Furthermore, the amount of the attorney's fee [in *Lynn Jewelers*] was fixed therein at $100 pursuant to the Plaintiff's own suggestion. Lynn Jewelers contended therein, as the Defendant argued herein, that the Plaintiff was not entitled to an attorney's fee because he was his own counsel. *And the Plaintiff suggested the modest amount of $100 so that he might obtain precedent for an award of an attorney's fee in this litigation which was then on appeal to the Court of Appeals. . . .*" (emphasis added) (Brief for Appellant White filed in court of appeals, at 27).

* White's counsel, during oral argument in the district court on the question of attorney's fees, relied on the *Lynn Jewelers* case in support of his argument that White was entitled to an attorney's fee since he could find no other Truth-in-Lending cases in which an attorney sued *pro se* and the issue of attorney's fees was raised (A 50; see 22a).

The district court's determination of attorney's fees.

Following the 1975 decision of the court of appeals reversing and remanding this case to the district court, White, at a hearing held on February 15, 1977, was awarded (i) a $4,000 attorney's fee for Steven A. Skalet, Esq. ("Skalet"), White's retained counsel on his successful appeal and remand, (ii) a $750 attorney's fee for his *pro se* representation at trial and (iii) taxable costs (14a-15a).

Prior to the hearing, counsel for Arlen had indicated that Arlen would not oppose a fee in the amount of $4,000 for White's retained counsel, but that it would, as a matter of law, oppose any fee for White's *pro se* representation (Brief for Appellee Arlen filed in the court of appeals, at 9). At the hearing, counsel for both Arlen and White stipulated that $4,000 would be fair and reasonable compensation for Skalet's efforts on his successful appeal to the court of appeals and on the district court's subsequent determination of attorneys' fees (A 51; see 21a-22a). This Court then proceeded to determine that, based upon the evidence presented, this fee was, in fact, fair and reasonable (A 51-52; see 21a-22a).

The balance of the hearing was devoted to the argument of the legal question as to whether White was entitled, as a matter of law, to any fee whatsoever and the

consideration of White's proofs submitted in support of his fee application (A 52-73).

The court determined that White should be awarded an attorney's fee and, after due consideration of the evidence presented, set the amount of the fee at $750 (14a). In examining the evidence, the district court observed that White's performance was "well below the average of the attorneys who practice before this Court" (11a); that "[h]is lack of familiarity with this Court's rules and trial procedures generally was apparent throughout" (13a); that "[m]uch of Mr. White's time was wasted by personal attacks on defendant and its attorneys" (14a); and that White "had wasted the time of the Court" (20a).

White's appeal to "correct the record and modify the award" of attorney's fees for his representation *pro se*.

On his appeal from the district court's determination of fees and costs, White requested the court of appeals:

> "*to correct the record and to (1) modify the award to allow him a 'reasonable' attorney's fee* as required by 15 U.S.C. §1640 (a)(3); (2) permit him to recover the non-taxable costs of this litigation *. . . and (3) permit him to recover the taxable and non-taxable costs of this appeal together with a 'reasonable' attorney's fee for his services preliminary to and in connection with this appeal. . . .*" (emphasis added) Brief for Appellant White filed in court of appeals, at 33.

In order that the court of appeals could re-determine the propriety of the district court's award, White, in his appellate briefs, (i) urged reconsideration and reexamination of alleged facts presented to the district court and

(ii) set forth alleged facts which were not part of the record of the district court.*

Arlen, following the submission of its brief in opposition to White, moved, on February 2, 1978, for summary affirmance of the district court's award pursuant to Rule 7 of the Rules of the United States Court of Appeals for the Fourth Circuit (2a, fn. 1). However, as a result of its perusal of the record, the court of appeals subsequently requested supplemental briefing from both White and Arlen on the question of whether a lawyer proceeding *pro se* is entitled to an award of attorney's fees under the TILA, 15 U.S.C. section 1640(a)(3).

The court of appeals held that a lawyer proceeding *pro se* is not entitled to attorney's fees in a TILA action, thereby reversing the order of the district court. The court reasoned:

> "It is evident that the provision for attorney fees was intended to create an incentive for attorneys to accept and handle Truth-in-Lending cases. . . . However, we do not think this rationale can be stretched so far as to fund an attorney's desire to be a 'private attorney general' on his own behalf. Such a result would raise the specter of fee generation." (3a)

Additionally, it was held that (i) the district court did not err in refusing to award White his travel and out-of-pocket expenses (5a) and (ii) White could not recover fees or costs on the appeal itself (5a).

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* The necessity for the court of appeals to reassess, in detail, the evidence submitted at the district court hearing, is clear. Having originally petitioned the district court for $8,000 as an attorney's fee for his representation *pro se* and moved to alter or amend the judgment by increasing the $750 award to $4,000, White stated to the court of appeals that $6,000 would be "tentatively reasonable" (Brief for Appellant White filed in court of appeals, at 26).

White's petition, in essence, merely rehashes the same arguments which he urged to the court of appeals. In large measure, White predicates his petition upon the alleged shortcomings of Skalet, his retained counsel, and has paraded the claimed sordid details of his attorney-client relationship before this Court. They are neither relevant nor appropriately raised here.

Furthermore, the multitude of factual allegations contained in White's petition go far beyond both the record below and the questions presented to this Court. Thus, stripped of its carping, White's lengthy polemic amounts to nothing more than yet another personal plea for an attorney's fee separate and apart from the statutory penalty and fee award for Skalet already granted him.

ARGUMENT

I.

The court of appeals properly addressed the question of White's entitlement to an attorney's fee for his *pro se* efforts in this action.

White has in no way demonstrated that the question of his entitlement of an attorney's fee for his self-representation in this action was erroneously raised in the court of appeals. In this regard, the district court ruled on the question, following consideration of the briefs submitted by the parties and oral argument (7a-10a, 19a). On appeal, moreover, White himself requested that the court of appeals search the record of the district court, and after due reexamination thereof, substitute its judgment for that of the district court on the attorney's fee question (Brief for Appellant White filed in court of appeals, at 33; see pp. 7-8, *supra*).

In any event, White was not prejudiced by the alleged error he now seeks to review, or surprised by it. Indeed, he had a full opportunity to argue the issue to the court of appeals (2a; Pet. 17).

Placed in this posture, the ability of the court of appeals to review the record and reverse the district court's award of an attorney's fee to White is unquestioned. *Tug Raven* v. *Trexler,* 419 F.2d 536 (4th Cir. 1969), *cert. denied sub. nom. Crown Petroleum Corp.* v. *Trexler,* 398 U.S. 938 (1970); *Rhoads* v. *Ford Motor Company,* 514 F.2d 931 (3rd Cir. 1975); *International Business Machines* v. *Levin,* 579 F.2d 271, 278 (3d Cir. 1978). As enunciated by the court in *Rhoads* v. *Ford Motor Company, supra,* 514 F.2d at 934:

> "Once appellate jurisdiction attaches, 'the power of the court of appeals should be plenary to the extent that it chooses to exercise it. A court should not close its eyes to what is plainly there.'"

Under these circumstances, it is established that the court of appeals may modify a judgment in favor of an appellee in the absence of a cross-appeal. *Langnes* v. *Green,* 282 U.S. 531, 535-538 (1931); *Tug Raven* v. *Trexler, supra,* 419 F.2d at 548; 28 U.S.C. section 2106 (1976); 9 Moore's Federal Practice (1980 ed.) ¶110.25[1] at 273; see *Hurwitz* v. *Directors Guild of America, Incorporated,* 364 F.2d 67 (2d Cir.), *cert. denied,* 385 U.S. 971 (1966).

II.

The ruling of the court of appeals on White's entitlement to an attorney's fee for his representation *pro se* conforms with applicable precedent.

The court of appeals' holding that a lawyer proceeding *pro se* under the TILA is not entitled to the recovery of an attorney's fee creates no conflict with any decisions of this Court or other circuits. Indeed, White cites no decisions of this Court that address any aspect of this issue. Moreover, the decisions of other circuit courts cited by White are either supportive of the decision below or inapposite. *Hannon* v. *Security National Bank,* 537 F.2d 327 (9th Cir. 1976) (a law school graduate not licensed to practice law is not entitled to recover an attorney's fee for prosecuting a TILA action *pro se*); *Sellers* v. *Wollman,* 510 F.2d 119 (5th Cir. 1975) (plaintiffs should not be denied attorney's fees under the TILA because the attorney representing them was employed by a legal aid society); *Manning* v. *Princeton Consumer Discount Company, Inc.,* 533 F.2d 102 (3d Cir.) *cert. denied,* 429 U.S. 865, *rehearing denied,* 429 U.S. 933 (1976) (same).

Significantly, the weight of authority, in conformity with the holding of the court of appeals in this case, denies the recovery of attorney's fees to plaintiffs who appear *in propria persona.* See, *e.g., Bone* v. *Hibernia Bank,* 354 F. Supp. 310 (N.D. Cal. 1973) (TILA action); *Picking* v. *Penn. R. Co.,* 11 F.R.D. 71, 72 (N.D. Pa. 1951), *appeal dismissed,* 201 F.2d 672 (3d Cir.), *cert. denied,* 345 U.S. 1000, *rehearing denied,* 346 U.S. 843 (1953) (" 'The general rule is that an attorney who acts for himself is not entitled to a counsel fee against his adversary' "); *Gorse* v. *Parker,* 36 F. 840 (C.C.N.D. Ill. 1888) (a layman representing himself may not recover under a statute providing for the allowance of compensation to "attorneys, solicitors and proctors in the courts of the United States").

Moreover, White, a full-time attorney employed by the federal government, maintained a private practice prosecuting numerous TILA cases on his own behalf. This type of conduct should not be countenanced or rewarded, especially where the sole apparent purpose of the litigation is to advance White's private commercial interest by the generation of attorney's fees.

In this regard, the TILA may not be used as a vehicle for obtaining windfall profits or unjustly enriching plaintiffs or their counsel. As was observed in *Andrucci* v. *Gimbel Brothers,* 365 F.Supp. 1240, 1243 (W.D. Pa. 1973), *aff'd,* 505 F.2d 729 (3d Cir. 1974):

> "The obvious intent of Congress was to set standards by which to achieve meaningful 'truth-in-lending' and not to deviously set traps by which windfalls could be reaped by fanciful lawyers."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ADDENDUM

Text of Statutes Involved

The Truth in Lending Act, 15 U.S.C. section 1640(a) (1976), provides:

> "(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part of part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of
>
> (1) any actual damage sustained by such person as a result of the failure;
>
> (2) (A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or
>
> (B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

> In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional."

28 U.S.C. section 2106 (1976) provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."